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No. 95-1340

In the Supreme Court of the United States

OCTOBER TERM, 1995

HUGHES AIRCRAFT COMPANY, PETITIONER

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The False Claims Act prohibits a variety of fraudulent or deceptive practices involving government funds and property. 31 U.S.C. 3729. The Act authorizes individual citizens (known as "relators") to bring private suits, commonly referred to as *qui tam* actions, to enforce the Act for the benefit of the United States. 31 U.S.C. 3730(b)(1). A 1986 amendment to the Act provides that "[n]o court shall have jurisdiction over [a *qui tam*] action * * * based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." 31 U.S.C. 3730(e)(4)(A). The questions presented in this case are as follows:

1. Whether Section 3730(e)(4)(A) applies to the instant suit, which was filed after the effective date of the 1986 amendments but alleged pre-amendment violations.

2. Whether the court of appeals erred in holding that no "public disclosure" had occurred in this case.

3. Whether injury to the public fisc is an essential element of a False Claims Act suit.

4. Whether the *qui tam* provisions of the False Claims Act are constitutional.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATUTORY PROVISION INVOLVED

Section 3730 of Title 31, United States Code, is reprinted as an appendix to this brief.

STATEMENT

1. The False Claims Act (FCA or Act) prohibits any person from "knowingly" presenting "a false or fraudulent claim for payment or approval" to the federal government. 31 U.S.C. 3729(a)(1). The Act also prohibits a variety of related deceptive practices involving govern-

ment funds and property. 31 U.S.C. 3729(a)(2)-(7). Any person who violates the Act is liable to the United States for treble damages and a civil penalty of up to $10,000 for each violation. 31 U.S.C. 3729(a).

The Attorney General may bring a civil action against an alleged violator. 31 U.S.C. 3730(a). The Act also authorizes individual citizens (known as "relators") to bring private suits, commonly referred to as *qui tam* actions. 31 U.S.C. 3730(b)(1).[1] The Act provides that a *qui tam* action is brought "for the person [the relator] and for the United States Government." *Ibid.* When a *qui tam* action is filed, the government may intervene to take over the litigation "within 60 days after it receives both the complaint and the material evidence and information," 31 U.S.C. 3730(b)(2), or "at a later date upon a showing of good cause," 31 U.S.C. 3730(c)(3). If the government elects not to intervene, the relator "shall have the right to conduct the action." *Ibid.*

Any monetary recovery in a *qui tam* action is divided between the government and the relator. In cases in which the government does not intervene and the relator conducts the action, the relator receives between 25 and 30 percent of the proceeds of the action or settlement, while the United States receives the rest. 31 U.S.C. 3730(d)(2). If the government intervenes and prosecutes the action, the relator generally receives between 15 and 25 percent of the proceeds. 31 U.S.C. 3730(d)(1).[2]

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[1] "Qui tam" is a shortened version of the Latin phrase "qui tam pro domino rege quam pro se ipso in hac parte sequitur," which means "who brings the action for the king as well as for himself." See *United States ex rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 746 n.3 (9th Cir. 1993), cert. denied, 510 U.S. 1140 (1994).

[2] The Act provides, however, that "[w]here the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation." 31 U.S.C. 3730(d)(1).

In *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 545-548 (1943), this Court held that a *qui tam* suit under the FCA could go forward even if the allegations in the complaint were derived entirely from a criminal indictment filed by the government in a related case. Congress amended the Act shortly thereafter to preclude such "parasitical" actions. See Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 609; *United States ex rel. State of Wisconsin* v. *Dean*, 729 F.2d 1100, 1104 (7th Cir. 1984) ("Congress's immediate concern in enacting the 1943 amendments was to do away with the 'parasitical suits' allowed by *Hess*"). From 1943 to 1982, the FCA provided that "[t]he court shall have no jurisdiction to proceed with any [*qui tam*] suit * * * whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." 31 U.S.C. 232(C) (1976). The substance of that jurisdictional bar was carried forward when the Act was recodified in 1982. See Act of Sept. 13, 1982, Pub. L. No. 97-258, § 1, 96 Stat. 979. Thus, as of 1982, the Act provided that "the court shall dismiss [a *qui tam*] action * * * on discovering the action is based on evidence or information the Government had when the action was brought." 31 U.S.C. 3730(b)(4) (1982).

Those versions of the jurisdictional bar were consistently construed by the courts to preclude *qui tam*

actions even where the government had made no effort to investigate allegations of fraud, see S. Rep. No. 345, 99th Cong., 2d Sess. 12 (1986), and even where the relevant information had been brought to the government's attention by the relator himself, see *id.* at 12-13 (citing *State of Wisconsin*, *supra*). To address those concerns, Congress amended the jurisdictional bar in 1986. The current version of the bar provides:

> No court shall have jurisdiction over [a *qui tam*] action * * * based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless * * * the person bringing the action is an original source of the information.

31 U.S.C. 3730(e)(4)(A).[3]

2. This case involves a *qui tam* action filed in January 1989 by respondent William J. Schumer, then an employee of petitioner Hughes Aircraft Company. Respondent alleged that petitioner had developed and built radar components for use in its government contracts for both the B-2 bomber and the F-15 fighter plane that should have been charged entirely to the F-15 contract. Respondent contended that petitioner had violated the FCA by creating an internal "commonality agreement" that allowed the company to charge the costs of those radar components in part to the B-2 contract. See Pet. App. 3a-4a. After investigating respondent's allegations,

[3] The Act defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. 3730(e)(4)(B).

the Department of Justice declined to intervene to take over the litigation. *Id.* at 4a. Respondent then pursued the action without participation by the government.

3. Petitioner moved to dismiss the suit on several grounds unrelated to the merits of respondent's allegations. Petitioner noted that the FCA violations were alleged to have occurred before the 1986 amendments to the Act. It argued that the suit should be governed by the law in effect at the time of the alleged violations, and that respondent would have been barred from pursuing this matter under the jurisdictional bar found in the Act at that time. Petitioner also contended that respondent's suit was "based upon" a "public disclosure" of "allegations or transactions in a[n] * * * administrative * * * audit" and was therefore foreclosed even under the jurisdictional bar as amended in 1986. Finally, petitioner argued that the Act's *qui tam* provisions are unconstitutional. The district court summarily denied petitioner's motions to dismiss. Pet. App. 34a-35a.

4. Petitioner subsequently moved for summary judgment on the merits of respondent's allegations. The district court granted that motion. See Pet. App. 36a-64a. The court found that petitioner had properly informed the government and other contractors of its use of the commonality agreements, and that no genuine issue of material fact existed as to whether petitioner had submitted a false claim. *Id.* at 4a, 64a.

5. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-31a.

a. The court first concluded that the case is governed by the current version of the FCA's jurisdictional bar provision, 31 U.S.C. 3730(e)(4), rather than by the version in effect at the time of the alleged violations. Under this Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244, 274 (1994), the court of appeals explained,

there is "a strong presumption that jurisdictional statutes apply retrospectively." Pet. App. 6a. The court found nothing in the text or history of Section 3730(e)(4) to rebut that presumption. *Id.* at 7a.

b. The court of appeals next held that respondent's suit was not precluded by the current version of the FCA's jurisdictional bar because there had been no "public disclosure" within the meaning of Section 3730(e)(4)(A). The court rejected petitioner's contention that "the dissemination of government audits to employees of [petitioner and the prime contractor] who were not involved in the alleged fraud constituted public disclosure," Pet. App. 8a, explaining that, "in the context of defense procurement, security considerations generally require that the government, contractors, and subcontractors operate within a closed loop of secrecy," *id.* at 9a. The court held on that basis that "disclosure to company employees does not constitute public disclosure." *Id.* at 11a. The court of appeals also rejected petitioner's contention that the audits in question constituted "public disclosures" because they were potentially available to the public under the Freedom of Information Act (FOIA), 5 U.S.C. 552. See Pet. App. 11a-13a.[4]

c. Petitioner also challenged the constitutionality of the FCA's *qui tam* provisions. Petitioner contended that *qui tam* relators fail to satisfy Article III standing requirements; that the *qui tam* provisions violate separation of powers principles; and that the provisions violate limitations under the Appointments Clause, Art. II, § 2,

[4] Because the court concluded that there had been no "public disclosure" of the audits in question, it did not address the question whether respondent's suit was "based upon" those audits, or whether respondent was an "original source" of the allegations. Pet. App. 14a; see page 4 & note 3, *supra*.

Cl. 2, on who may conduct litigation on behalf of the United States. The court of appeals rejected those arguments on the basis of its prior decisions in *United States ex rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 747-759 (9th Cir. 1993), cert. denied, 510 U.S. 1140 (1994), and *United States ex rel. Madden* v. *General Dynamics Corp.*, 4 F.3d 827, 830 (9th Cir. 1993). See Pet. App. 14a.

d. The court then considered respondent's appeal from the district court's decision granting summary judgment to petitioner on the merits of respondent's claims. The court concluded that genuine issues of material fact existed regarding the adequacy of petitioner's disclosure to its prime contractor, the Northrop Corporation, of its method of allocating the radar costs to the B-2 contract. See Pet. App. 19a-22a. The court also found genuine issues of material fact with respect to respondent's claim that petitioner had failed to comply with the cost accounting statements (CAS) that it was required to submit to the government. See *id.* at 22a-26a.

ARGUMENT

The court of appeals correctly resolved the questions presented in the petition. Further review is not warranted.

A. Petitioner contends (Pet. 9-11) that the court of appeals erred in applying the current version of the FCA's jurisdictional bar to respondent's suit, which alleged that violations of the Act had occurred before the effective date of the 1986 FCA amendments.

1. In *Landgraf* v. *USI Film Products*, 511 U.S. 244, 265 (1994), this Court recognized that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." The Court also observed, however, that "[a] statute does not operate 'retrospectively'

merely because it is applied in a case arising from conduct antedating the statute's enactment." *Id.* at 269. The Court noted, in particular, that it had "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 274. The Court explained that "[p]resent law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Ibid.* (internal quotation marks omitted); see also *id.* at 292 (Scalia, J., concurring in the judgments) (noting the Court's "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction").

Both the current Section 3730(e)(4) and its predecessor version have governed the jurisdiction of the district court rather than the substantive rights and obligations of the parties. See Pet. App. 6a-7a; *United States ex rel. Kreindler & Kreindler* v. *United Technologies Corp.*, 985 F.2d 1148, 1157 (2d Cir.), cert. denied, 508 U.S. 973 (1993); *United States ex rel. Precision Co.* v. *Koch Indus.*, 971 F.2d 548, 551 (10th Cir. 1992), cert. denied, 507 U.S. 951 (1993); *Houck ex rel. United States* v. *Folding Carton Admin. Comm.*, 881 F.2d 494, 504, 506 & n.9 (7th Cir. 1989), cert. denied, 494 U.S. 1025, 1026, 1027 (1990). Replacement of former Section 3730(b)(4) with the current "public disclosure" provision neither prohibited previously lawful conduct nor increased the penalties for violations. The amendment therefore did not alter either the existence or the extent of petitioner's liability to the government; it simply expanded the circumstances under which *qui tam* relators may file suit to enforce that liability. See Pet. App. 7a. Application of the current Section 3730(e)(4) to the instant suit is thus consistent with this Court's precedents.

2. Petitioner contends (Pet. 9-10) that review is warranted to resolve a conflict between the decision in the instant case and that of the Sixth Circuit in *United States* v. *TRW, Inc.*, 4 F.3d 417, 422-423 (1993), cert. denied, 114 S. Ct. 1370 (1994). The court in *TRW* considered the applicability of the 1986 FCA amendments to two *qui tam* complaints alleging pre-amendment violations. The court concluded that "the provisions that govern are those that were in effect at the time the conduct that is the subject of the litigation occurred." *Id.* at 423 (footnote omitted); see also *id.* at 426.[5]

The decision in *TRW* predated this Court's ruling in *Landgraf*. The *TRW* court did not address the question whether Section 3730(e)(4)'s limitation on *qui tam* actions (or the stricter limitation formerly contained in 31 U.S.C. 3730(b)(4) (1982)) was properly characterized as a "jurisdictional" rule for purposes of retroactivity analysis. In light of this Court's intervening decision in *Landgraf*, it is not clear that the Sixth Circuit would adhere to the conclusion that Section 3730(e)(4) is inapplicable to suits alleging pre-amendment violations. We therefore do not believe that there is currently an irreconcilable circuit conflict on this question.

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[5] One of the complaints at issue in *TRW* was filed before the effective date of the 1986 amendments; the other was filed after that date. Both complaints alleged pre-amendment violations. The government argued that the pre-amendment jurisdictional bar applied to the first complaint, see Brief for the United States at 22-24 (Nos. 91-3784 & 92-3066), but that the jurisdictional provisions of the 1986 amendments applied to the second complaint, see *id.* at 45-47. The Sixth Circuit held that the 1986 amendments did not apply to either complaint. See 4 F.3d at 423; *id.* at 426 (concluding that "the 1982 provisions [of the FCA] apply because [the second complaint], although filed in 1987, was based on TRW's conduct, which occurred prior to the enactment of the 1986 amendments"). The instant *qui tam* action was filed after the effective date of the 1986 amendments. See Pet. App. 4a.

3. The effective date of the statutory amendment at issue here is October 27, 1986. See False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153. The longest statute of limitations under the FCA, including equitable tolling, is ten years. 31 U.S.C. 3731(b)(2). As of October 27, 1996, new cases involving claims arising before the passage of the 1986 amendments will be barred by the statute of limitations. Even if a square circuit conflict existed, the question presented therefore is not of sufficient continuing importance to warrant this Court's review.

B. Petitioner next contends that respondent's suit is barred even if current Section 3730(e)(4) is applicable to the instant case. Petitioner argues that (1) the disclosure of government audits to petitioner's own employees constituted a "public disclosure" within the meaning of Section 3730(e)(4) (Pet. 11-15), and (2) the potential availability of the government audits pursuant to the FOIA likewise constituted a "public disclosure" (Pet. 16-18).

1. The Ninth Circuit held in the instant case that disclosure of government audits to petitioner's own employees did not constitute a "public disclosure" within the meaning of Section 3730(e)(4). Pet. App. 8a-11a. In the court's view, disclosures to a contractor's employees, like exchanges of information between officials within the government, "involve the release of information within a private sphere." *Id.* at 10a. Petitioner contends that review by this Court is warranted to resolve a conflict between the Ninth Circuit's decision in the instant case and that of the Second Circuit in *United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318 (1992).

In *Doe*, federal investigators executed a search warrant on the premises of a corporation suspected of defrauding the government. 960 F.2d at 319. The agents interviewed a number of the company's employees,

explaining that they were investigating allegations of fraud. *Id.* at 319-320. An attorney retained by one of the employees subsequently filed a *qui tam* action against the company. *Id.* at 320. The Second Circuit held that Section 3730(e)(4) barred the relator's *qui tam* suit because "the allegations of fraud * * * were actually divulged to strangers to the fraud, namely the innocent employees of John Doe Corp." *Id.* at 322 (emphasis omitted). The court noted that, "[w]hen these innocent employees learned of the fraud, they were under no obligation to keep th[e] information confidential." *Id.* at 323. The court rejected the relator's contention that disclosure to those employees was insufficient to place the allegations in the public domain, concluding that there was "no principled distinction between defendants' customers and defendants' innocent employees" because "both are members of the public." *Ibid.*

The Ninth Circuit believed that its decision in the instant case conflicted with the ruling in *Doe*. See Pet. App. 9a (court of appeals "decline[d] to adopt the rule of *Doe* for application in this circuit," stating that "the *Doe* court's treatment of company employees as members of the public is unrealistic"). In our view, however, the holdings are reconcilable.

The question whether information revealed to a corporate defendant's employees is the subject of a "public disclosure" cannot appropriately be resolved on the basis of a per se rule. Rather, the application of the jurisdictional bar depends upon the circumstances under which the information is revealed, including the employee's freedom (or lack thereof) to transmit the information to the general public. An agency record released to an employee of a corporate defendant in response to a FOIA request, for example, would surely constitute a "public disclosure." The employee would receive the record in his capacity

as a member of the public, and his status as a corporate employee would place no restrictions on his entitlement to disseminate the material to a wider audience. By contrast, no "public disclosure" would occur if the government revealed information to a corporate employee upon the condition that he would not convey it to others.

The Ninth Circuit's conclusion that there was no "public disclosure" of the audit reports at issue in the instant case is consistent with the foregoing principles. We are aware of no evidence suggesting that the reports were divulged by the government to any Hughes employees other than those designated to receive them by top Hughes management. The employees designated by petitioner presumably received the reports upon the understanding that they would use the information contained therein only in furtherance of petitioner's business. The Ninth Circuit reasonably concluded that such a limited dissemination of the reports was insufficient to place them in the public domain.[6]

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[6] Petitioner also contends (Pet. 15 n.5) that the audit reports in question were provided to employees of the prime contractor (Northrop), and that disclosure of the reports to those employees constituted a separate "public disclosure." The only audit report disclosed to the prime contractor, however, was the classified Air Force Audit 86-5, which was not declassified until September 5, 1990, 19 months after this *qui tam* suit was filed. See Exhibit 1 to Affidavit of John F. Wilson, filed as Exhibit 62 to Hughes' Exhibits in Support of Motion for Summary Judgment, filed 1/27/92 (showing declassification stamp). Because that audit report was classified at the time the *qui tam* suit was filed, its disclosure to Northrop could not have qualified as a "public disclosure." The Northrop custodian of records was able to identify no other relevant government audit reports in Northrop's possession. See Declaration of Laurie L. Bilbruck and Attachments, dated 10/12/90, filed as Attachment D to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed 10/15/90.

The Second Circuit's decision in *Doe* is also consistent with the principles discussed above. The employees who were informed (directly by the government) of the allegations of fraud were no doubt interviewed because of their connection to the company and the consequent possibility that they might have knowledge of corporate wrongdoing. They acquired information from the government, however, not in the course or scope of their private employment, but essentially as members of the public who might have had knowledge of evidence relevant to the government's investigation. Those employees were therefore subject to no fiduciary or other comparable obligation to the employer to maintain the confidentiality of the information they acquired during their interviews. See 960 F.2d at 323 (employees interviewed "were under no obligation to keep th[e] information confidential"). Because the disclosures at issue in *Doe* were of a significantly different nature than those in the instant case, and because the public disclosure issue in each case was correctly decided, we believe that this question does not warrant further review.[7]

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[7] Contrary to petitioner's contention (Pet. 13), the Ninth Circuit's ruling does not deprive the government of adequate protection against "parasitic" *qui tam* actions. Where the government intervenes to take over a *qui tam* suit, the relator is generally entitled to between 15 and 25 percent of any monetary recovery. 31 U.S.C. 3730(d)(1). The relator in such cases may recover no more than 10 percent of the proceeds, however, if the action is "based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." *Ibid.*; see note 2, *supra*. That provision does not require that the "disclosures" in question be "public." Thus, even where the jurisdictional bar is inapplicable, the Act provides for a suitable reduction (to zero, if appropriate) of the relator's share of any recovery

2. The decisions of the Second and Third Circuits in *Kreindler & Kreindler*, 985 F.2d at 1158, and *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A.* v. *Prudential Insurance Co.*, 944 F.2d 1149, 1159 (3d Cir. 1991), do not support the proposition that the potential availability of government records under the FOIA constitutes a "public disclosure" within the meaning of Section 3730(e)(4)(A). Those cases involved discovery materials that had been placed in court files and were unquestionably available for the asking to any member of the public. See *Kreindler & Kreindler*, 985 F.2d at 1158; *Stinson*, 944 F.2d at 1159. Whether a federal agency record is accessible under the FOIA, by contrast, depends on whether it is covered by one of the exceptions to the FOIA's general disclosure requirements. See 5 U.S.C. 552(b). A "public disclosure" does occur when agency records are actually released to a member of the public pursuant to a FOIA request. See pages 11-12, *supra*. We are aware of no case, however, suggesting that an agency record can be deemed the subject of a "public disclosure," within the meaning of Section 3730(e)(4)(A), simply because a court concludes that a hypothetical FOIA request would result in release of the document.

C. Petitioner argues (Pet. 20-22) that injury to the public fisc is an essential element of a cause of action under the FCA. Any person who violates the FCA is liable, for each violation, "for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. 3729(a). As the Senate Report accompanying the 1986 FCA amendments explains, "[t]he United States is entitled to recover

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if the *qui tam* suit is "parasitic" in nature and makes no substantial contribution to the discovery or remediation of fraud.

[civil penalties] solely upon proof that false claims were made, without proof of any damages." S. Rep. No. 345, 99th Cong., 2d Sess. 8 (1986) (citing *Fleming* v. *United States*, 336 F.2d 475, 480 (10th Cir. 1964), cert. denied, 380 U.S. 907 (1965)). Accord *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 152-153 & n.5 (1956).[8]

The cases on which petitioner relies (see Pet. 21) do not support the proposition that injury to the public fisc is an essential element of a cause of action under the FCA. *United States* v. *American Heart Research Foundation, Inc.*, 996 F.2d 7, 9-10 (1st Cir. 1993), simply held that the underpayment of an obligation to the government did not constitute a "false claim." *United States ex rel. Glass* v. *Medtronic, Inc.*, 957 F.2d 605, 607-608 (8th Cir. 1992), held that the claim in question was not "false." The court in *United States* v. *Azzarelli Construction Co.*, 647 F.2d 757, 762 (7th Cir. 1981), did state that "the lack of any requirement of specific evidence of damages does not dispense with the need to establish an injury." The *Azzarelli* court also stated, however, that "the allegedly false claim must be one that is capable of causing an injury to the funds or property of the United States if the claim is in fact paid." *Id.* at 759. That formulation strongly suggests that the government may collect civil penalties under the FCA even where it avoids pecuniary injury by (for example) recognizing the fraudulent nature of a claim and refusing to pay it. Moreover, the holding of *Azzarelli*—that no FCA suit could be maintained based on fraud in a state highway

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[8] Petitioner's reliance (Pet. 21) on 31 U.S.C. 3731(c) is misplaced. As noted in the text, the FCA authorizes an award of three times the government's damages in addition to any civil penalty. Section 3731(c) simply makes clear that the amount of any such damages must be proved by a preponderance of the evidence. It does not suggest that the government must prove damages in order to recover civil penalties.

construction program partially funded by federal block grants, see *id.* at 762—has since been overruled by statute. See 31 U.S.C. 3729(c).[9]

D. Petitioner contends that the *qui tam* provisions of the FCA (1) violate Article III of the Constitution by permitting suits by persons who have not been injured by the alleged fraudulent conduct (Pet. 25-26), and (2) violate the Appointments Clause and separation of powers principles by allowing private individuals to conduct litigation on behalf of the United States (Pet. 23-25).

1. Petitioner does not contend that any conflict in authority exists regarding the constitutionality of the *qui tam* provisions.[10] As respondent points out (Br. in Opp.

[9] For the foregoing reasons, the second question presented in the petition—whether injury to the public fisc is an essential element of an FCA cause of action—does not warrant this Court's review. The government takes no position, however, regarding the merits of respondent's FCA claims or the correctness of the Ninth Circuit's holding that respondent had raised genuine issues of material fact.

[10] Petitioner notes (Pet. 22-23) that the Department of Justice's Office of Legal Counsel (OLC) previously took the position that the *qui tam* provisions of the FCA are unconstitutional. As respondent points out (Br. in Opp. 15 n.13), the OLC memorandum in question makes clear that, at the time it was written, significant disagreement existed within the Department of Justice regarding the proper resolution of the constitutional issues involved. The OLC memorandum was an internal recommendation to the Attorney General; it was not a formal OLC opinion. See 13 Op. Off. Legal Counsel 249, 286 (1989) (memorandum concludes by "recommend[ing] that [the Attorney General] authorize the Civil Division to enter an appropriate case and present the Executive Branch's arguments against the constitutionality of qui tam"). The Attorney General did not take a position on the issue in response to the OLC memorandum; the Department as a whole has never taken the position that the *qui tam* provisions are unconstitutional; and OLC itself has since formally disavowed the reasoning of the prior OLC memorandum regarding the Appointments Clause. See Memorandum for the General Counsels of the Federal Government, *The Constitutional Separation of Powers between the President and Congress* 20-21 n.53 (OLC May 7, 1996).

13-14), the courts of appeals that have considered the question have uniformly rejected the constitutional challenges advanced by petitioner in this case. See *United States ex rel. Taxpayers Against Fraud* v. *General Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *United States ex rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 747-759 (9th Cir. 1993), cert. denied, 510 U.S. 1140 (1994); *Kreindler & Kreindler*, 985 F.2d at 1153-1155.

2. a. "Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). The understanding of the Framers is central to interpreting Article III's delineation of federal judicial power. See *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment) ("'[t]he judicial Power of the United States' conferred upon this Court and such inferior courts as Congress may establish, Art. III, § 1, must be deemed to be the judicial power as understood by our common-law tradition"). *Qui tam* actions were common in England and in the States at the time the Constitution was adopted, and statutes permitting such suits to be filed in federal court were repeatedly enacted by early Congresses. See, *e.g.*, *Marvin* v. *Trout*, 199 U.S. 212, 225 (1905) (discussing long-standing acceptance of *qui tam* mechanism). The Framers' evident assumption that adjudication of *qui tam* actions is a proper exercise of the Article III judicial power weighs heavily in the constitutional analysis.

At least as a general matter, moreover, adjudication of *qui tam* actions by the federal courts is consistent with

the values underlying the case or controversy requirement. Article III standing doctrine serves "to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472. The case or controversy requirement thus confines federal courts to determining the "rights of individuals," rather than permitting litigation to be used to vindicate the "undifferentiated public interest" in the proper administration of federal law. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 576-577 (1992).

Qui tam suits are unlikely to enmesh the federal courts in abstract or hypothetical inquiries. To the contrary, adjudication of such actions requires the application of legal principles to concrete factual settings. Nor can *qui tam* relators plausibly be accused of using the legal system as a means of advancing an ideological agenda or pursuing their own notions of wise public policy. Rather, they seek to obtain an award of *money*, and thus possess the prototypical "concrete stake" in the outcome of the litigation. Thus, the consistent willingness of federal courts to adjudicate *qui tam* actions is not an historical anomaly; use of the *qui tam* mechanism is consistent with the values that the "case or controversy" requirement is intended to protect.[11]

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[11] The *qui tam* mechanism may be analogized to the assignment of a chose in action. See *Kelly*, 9 F.3d at 748-749. In *Spiller* v. *Atchison, Topeka & Santa Fe Railway*, 253 U.S. 117 (1920), the Court recognized that "[a] claim for damages sustained through the exaction of unreasonable charges for the carriage of freight is a claim not for a penalty but for compensation, is a property right assignable in its nature, and must be regarded as assignable at law, in the absence of any expression of a legislative intent to the contrary." *Id.* at 135 (citations omitted). The federal courts have consistently held that rights of action against insurers for bad faith refusal to settle claims are assignable. See, *e.g.*, *Bailey* v. *Prudence Mut. Casualty Co.*, 429 F.2d 1388, 1389-1390 (7th Cir. 1970); *Rowe* v. *United States Fidelity & Guaranty Co.*, 421 F.2d 937, 940-942 (4th Cir. 1970); *Steedly* v. *London & Lancashire Ins. Co.*, 416 F.2d 259, 262-263 (6th Cir. 1969); *Liberty Mut. Ins. Co.* v. *Davis*, 412 F.2d 475, 484-485 (5th Cir. 1969).

Congress has broad power under the Property Clause of the Constitution, Art. IV, § 3, Cl. 2, to dispose of such a property right of the United States by assignment. For Article III purposes, however, the crucial point is not whether Congress conceived of the *qui tam* provisions as "assignments" when it passed or amended the FCA, or whether those provisions conform precisely to the rules that generally govern the assignability of choses in action. Rather, cases involving the assignment of claims demonstrate that federal courts can and do validly adjudicate suits in which a plaintiff has not been individually injured by a defendant's primary conduct, but has nevertheless acquired an adequate concrete stake in the litigation through a transfer of rights from a person who *has* suffered injury. See *Defenders of Wildlife*, 504 U.S. at 572-573 (distinguishing the standing ruling in that case from one "in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit, by providing a cash bounty for the victorious plaintiff").

b. *Qui tam* relators are not "Officers of the United States," and their selection is not governed by the Appointments Clause. Congress has not "established by Law" a government "Office" of FCA informer or relator. To the contrary, the Act's *qui tam* provision is entitled "ACTIONS BY PRIVATE PERSONS." 31 U.S.C. 3730(b). Insofar as the Appointments Clause is concerned, the relator is more aptly analogized to a plaintiff who invokes a private right of action under a federal statute. Congress's decision to create a private right of action may often rest in part on its belief that such provisions will vindicate a societal interest in deterring and remedying violations of federal law by enlisting private individuals in the process by which the law is

enforced. The fact that a private lawsuit assists in the effectuation of federal policy does not transform the plaintiff into an "Officer of the United States" whose selection is governed by the Appointments Clause.

c. For much the same reasons, the *qui tam* provisions of the FCA do not violate separation of powers principles. This Court "has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). The Executive Branch's exercise of prosecutorial discretion is presumptively unreviewable, however, only in the sense that executive officials generally cannot be compelled by a court to pursue an enforcement action that they believe to be unwarranted. Federal law frequently permits a private party to file a civil action even when governmental officials believe that no violation has occurred, see, *e.g.*, 42 U.S.C. 2000e-5(f)(1) (private plaintiff may file Title VII action if charge of unlawful employment discrimination is dismissed by the Equal Employment Opportunity Commission), and such provisions raise no separation of powers concerns.[12]

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[12] If the government elects to intervene in a *qui tam* action, see 31 U.S.C. 3730(b)(2)-(4), "it shall have the primary responsibility for prosecuting the action," 31 U.S.C. 3730(c)(1), but the relator retains the right to continue as a party, see *ibid*. In the instant case, the government declined to intervene to take over the litigation. See Pet. App. 4a. This case would therefore be an inappropriate vehicle for the resolution of any constitutional issues that might be raised by the relator's continued participation in a suit in which the government did intervene. In our view, however, the Act, if properly applied, affords sufficient protection of Executive Branch authority to satisfy any constitutional concerns. See 31 U.S.C. 3730(b) and (c).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

The False Claims Act, 31 U.S.C. 3730, provides as follows:

§ 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by

affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall

have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to

an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such ex-

penses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional,

administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any

special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.